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RETAINING JURISDICTION IN SUIT FOR INJUNCTION AGAINST PRESCRIBED RATE WHERE DECREE THEREFOR HAS BEEN REVERSED WITHOUT PREJUDICE.

In 78 Cent. L. J. 73 we wrote editorially under the caption "Injunction Bonds in Rate Cases—Impounding Excess Above Statutory Rates." There we took as one position, that, where an injunction against a prescribed rate was sought, it should be conditioned upon the plaintiff depositing in court the excess of the prescribed rate and its distribution be made by final decree upon the merits.

By a decision of the Supreme Court on petition for a writ of mandamus rendered January 5, 1914, the theory we advanced as proper is tacitly recognized or at least it is conceded, in effect, that such an arrangement could be enforced. In re City of Louisville, 34 Sup. Ct. 255.

The opinion of Mr. Justice McKenna shows that in a suit for injunction by Cumberland Tel. & Tel. Co. v. Louisville, 225 U. S. 430, to enjoin an ordinance prescribing rates as confiscatory, a decree in favor of the company was, "reversed without prejudice." While the case was pending the city moved for an order requiring the company to pay into court all sums collected in excess of those fixed by the ordinance, precisely the course which we advocated in our editorial supra. The company agreed that if the court would make no order in pursuance of the motion it would keep an accurate account of such sums and on final hearing pay the amounts into court for distribution among those entitled thereto. Whereupon the court refrained from making the order prayed for.

Upon the arrival of the mandate the lower court set aside its decree and restored the case to the docket, and the city asked for and the court appointed a special master to take proof of and report the amount with interest, collected by the company. A motion by the city for this money to be paid into court was postponed and the master began on his duties.

The matter thus stood until March 10, 1913, when the court of its own initiative entered an order for a supplemental reference, appointing the clerk of the court a special master to ascertain and report the gross earnings of the company after the rate ordinance went into effect and the net income derived therefrom. It appears that the decree of the lower court was reversed on June 7, 1912, and the ordinance rates were put into effect July 1, 1912, a period of nine months thus intervening.

The city sought by mandamus to compel the judge to vacate this supplemental order, and the judge answered that under the judgment of reversal without prejudice it was in his discretion to retain the suit to ascertain whether a test of the ordinance showed it to be confiscatory or not. The Supreme Court ruled that the mandate permitted such exercise of discretion and dismissed the petition for mandamus. Mr. Justice McKenna quotes from the opinion to the effect, that there was "a delusive exactness" in the figures of the proof leaving "the whole question too much in the air for us to feel authorized to let the injunction stand." Then it was announced that "Decree is reversed without prejudice."

Naturally all of this seems to mean, that plaintiff failed in its proof, and having had its day in court the ordinance as to any facts which might have been produced to show its invalidity was valid, but, if any future operation of the ordi-

nance developed its invalidity, this might be urged.

So far as appears the company was not complaining that the ordinance was confiscatory. Though it said this in its original bill, this averment merely was a prediction that it would show itself to be confiscatory, and this for the simple reason that invalidity depended upon facts —which facts were postponed as to their existence by the injunction pending suit. Whose suit then is it that remains in court—that of the company or that of the court? May not the company say it will not consent to its proceeding or agree to incur any risk of costs in its prosecution? Can the court compel it to go on? How does it know that the company wishes it to go on? And, if it does, should not the city have had some opportunity to object to its wish being allowed?

It appears from the mandate that the city had judgment in the Supreme Court for all costs incurred in both courts up to the date the lower court's decree was reversed. But, if the Supreme Court had contemplated that the case was not at an end, why tax the costs as if it were, and then adjudge execution therefor?

But why should the Supreme Court leave the fate of a case "in the air" of the judge's discretion, as in this case, in stead of specifically directing that he could or not entertain an application for further hearing after a practical test? Suppose the case goes up again, and there is still "a delusive exactness" in the figures, may it be kept in court for another supplemental order? In the meantime the company holds on to the excess it has collected, in this case stated to be more than $100,000.

It is difficult to read the opinion in this case and appreciate the motive prompting the judge either in refusing the city's request to have excess over rates paid into court and then, pending the time for ascertaining the amount of this excess, making of his own motion this supplemental order. Had the city's motion have been granted the case would have been out of court long ago, and now it seems to be kept in merely to avoid paying the excess into court.

Lastly it may be urged, that even though the rates in force since the decree was reversed should not prove to be compensatory, this might not show conclusively that they would not have been during the time the injunction was in force. What in the way of *res judicata* is there in the judgment of reversal by the Supreme Court? The company attempted to show that an ordinance presumptively legal during a certain period, because compensatory during that time, was confiscatory and this it failed to do. And it failed, it may be, because by temporary injunction defendant suppressed the facts. N. C. C.

NOTES OF IMPORTANT DECISIONS.

USURY—USING STRAW MORTGAGEE IN AVOIDANCE OF STATUTE.—New Jersey Court of Chancery took such judicial notice of business customs as to hold that where a note secured by mortgage was on or about the date of their execution offered to a purchaser at a discount the circumstance put the offeree on inquiry as to the transaction being a scheme to avoid the usury laws of a state. Riley v. Hopkinson, 88 Atl. 1077. The court said: "Under such circumstances it seems impossible to escape the conclusion that the purchaser should be charged with a knowledge of all of the facts which reasonable inquiry on his part would have disclosed, and that the defense of usury is, in consequence, available to the mortgagor. Any conclusion to the contrary would be clearly destructive of the beneficial purpose of our statute against usury." This is in line with cases which hold that when fraud is shown as to a promissory note negotiated before maturity the burden shifts to the transferee, and it certainly seems so extraordinary that a mortgagee would lend for example, $1,000 at a law-

ful rate and immediately discount the face of the note, that inquiry would be provoked. Concurrence of time in investment in a security and its hawking at a loss well may be thought to be for no legitimate purpose.

ATLANTA'S NEW MUNICIPAL COURT.

Like moving a mountain to get at a mole, the Atlanta Bar Association was forced to have the constitution of Georgia amended by the voters of the state before it could begin actual further steps toward abolishing the justice of the peace courts in Atlanta. The association had to go back to the very well springs of law in the commonwealth.

Two years ago the constitutional amendment was ratified. It gave the state legislature authority to substitute for justice of the peace courts in Georgia cities of more than 20,000 population (Savannah alone excepted, upon the insistence of one of the representatives from that county), "such court or courts or system of courts as the general assembly may deem necessary."

Last August the legislature used that authority, and substituted in Atlanta a new municipal system of courts, patterned after the best in the land and embodying several original features. The Atlanta Bar Association prepared the measure that was passed.

On January 1, 1914, the eighteen justice of the peace courts in Atlanta passed out of existence.

"Any other method would have been like killing mosquitoes one at a time," said a member of the Bar Association's committee. "We went to the source whence they came."

For several years before the Atlanta Bar Association undertook its rather ambitious task, there had been repeated condemnation of the justice courts in the city. Conditions had passed from bad to worse until they became intolerable. But the community of Atlanta was only a small part of the state; and the state's organic law maintained the nuisance.

In May, 1912, the first manoeuver in their campaign was made by the Atlanta lawyers. At their instance, a bill was offered in the lower house of the assembly, to submit to the state's electorate an amendment to the constitution.

That bill was not enacted without some mighty strenuous and determined work in its behalf by the Atlanta Bar Association. The opposition was not organized openly, but the bushes were full of the bill's enemies.

On July 30, 1912, while the spotlight of public attention was turned full upon it, the bill was passed by a vote of 148 to 5.

That was the first step forward. The next step was to get the constitutional amendment itself ratified by the voters of Georgia.

In the general state election of October 2, 1912, when a new governor and other statehouse officers (already chosen in the Democratic primary) were to be elected perfunctorily, the Georgia voters were to declare their will upon the proposed amendment. Because the election was perfunctory, the danger existed that statewide indifference might expose the amendment to a watchful and active opposition.

In every militia district, with suspicion's hostile eye upon the amendment (even though it did not affect them), were rural justices of the peace and court bailiffs and other petty officials unnumbered; all men of local political influence, men of the type which never hesitates to swing a political following upon its own selfish interests. The amendment looked defeat squarely in the eye.

Immediately the committee of the Atlanta Bar Association was at work to meet this new and greater difficulty.

Pamphlets were distributed among all of these rural justices. With reassuring words that disarmed reasonable suspicion, the composers of the pamphlet assumed adroitly and quite cordially that they had but to explain in order to win the active support

of the reader. The explanation did suffice.

By the none too great margin of some 6,000 votes, the amendment won.

Thereupon the Atlanta Bar Association heaved a sigh of great relief. The meat of the cocoanut had been reached at last.

In the formulation of the Atlanta bill to substitute a municipal court system for the justice of the peace courts, the Bar Association committee profited by the progressive thought expressed elsewhere on that problem.

The measure was submitted to the legislature by the representatives from Fulton County on July 21. During the days that ensued before the passage of the measure. the Association committeemen stood guard over it almost day and night, working assiduously in its behalf—though it was merely a local measure, and its enactment ordinarily would have been but a perfunctory matter in the assembly.

Then it was that an interesting situation arose—a situation which may have ultimate result in the creation of a county and city of Atlanta and in the co-ordination of the two governments. It happens that Atlanta has grown eastward so rapidly and so extensively that it has overflowed into the adjoining county of DeKalb. There several thousands of its citizens have their homes, paying taxes in DeKalb and being subservient to the courts of that county. Court officials of DeKalb saw in the new law a deprivation to themselves, one certain section of it giving to the municipal court a considerably wider jurisdiction than in the justice courts. That meant nothing less than a reduction in the fees of the county officials. Therefore political influence brought pressure to bear upon the two representatives from DeKalb, causing them to oppose the bill. The tail wagged the dog. The small segment of Atlanta, lying in an unsympathetic county, forced a compromise in the municipal court bill. The compromise was this: that the municipal court shall have two sections, one to be known as the Fulton section and the other as the DeKalb section. The provisions relating to the Fulton section will be explained more fully later in this article. The DeKalb section, decreed the compromise, shall be presided over by two judges, both to be named by the superior court judge of the circuit, both to have the jurisdiction of justices of the peace, and both to receive fees. In short, two appointive offices of justices of the peace under another name were created in order to placate the disturbed officials. It was a hybrid measure, and it sat none too well upon the stomach of the Atlanta Bar Association; but there was no help for it. Anticipating that perhaps some day that section of the bill might be declared unconstitutional upon the ground that the system established was not uniform throughout the territorial limits of Atlanta, the framers of the measure put into it a provision that if the DeKalb section at any future time is abolished by legislative act or is declared void by the courts the Fulton section will extend automatically to include all of the territorial limits of the city.

The Atlanta bill, as it was draughted and recommended by the Bar Association, was enacted during the very last days of the 1913 session of the Georgia assembly.

Excepting those provisions already outlined, which relate to the DeKalb section exclusively, the law includes the following salient provisions:

It creates five judgeships, one of the incumbents to be designated as chief judge.

Lawyers with experience and credentials, and no others, are eligible for those judgeships.

The five judges shall be appointed by the governor, upon nomination by the several superior court judges of Fulton county. This is one of the unique features of the Atlanta law. It is regarded as an ideal method for taking the new municipal court entirely out of politics and insuring the wisest selection of its judges.

The judges shall be subject to suspension by ex parte proceedings before any judge of the superior court, and to removal in the

same tribunal after proper hearing on charges.

Two dollars must be deposited with each suit or other proceeding filed; except when the petitioner pleads poverty.

A test is provided of the pauper's oath. Any party at interest may contest that oath on his own affidavit. In no other Georgia court is this provision. Elsewhere a man of known wealth may swear he is a pauper and his word must be taken for it.

Disregard of technicalities, expedition of trials, and elimination of unnecessary expense, are directed.

The judges, clerks and marshals are salaried officers. The old pernicious system of fees, whereunder each man scrambled for as much as he could grab, without conscience as to where he grabbed it or how, is abolished.

The new municipal court of Atlanta is to be given jurisdiction concurrent with the superior court, with the following exceptions: cases over which exclusive jurisdiction is vested by the constitution in other courts; cases involving more than $500; injuries to person or reputation; criminal cases other than matters previously subject to hearing in justice courts; and extraordinary remedies, such as quo warranto, mandamus, and the like.

The salary of the chief judge is fixed at not less than $3,600 per annum; that of the associate judges at $3,000 per annum; clerk, $2,000; deputy clerk, $1,500; marshal, $1,800; and four deputy marshals, $1,500 each. The clerk is to be appointed by the judges of the court, and his deputy is to be appointed by him. The marshal and his deputies are to be named by the judges. The terms of the judges are rotative.

A provision for the suspension or removal of any of the judges or officers by judges of the superior court sets forth the following grounds: incompetency, inefficiency, neglect of duty, or misconduct in or out of office, which, "in the opinion of such judge of the superior court tends to lower the dignity of such official or render him unfit to fill such office."

This provision is aimed at two of the pronounced defects in the old system. Under one of them, unofficial corruption or immorality of a justice court official did not lay him liable to dismissal. He might be a reprobate out of office, yet cling to his job as long as he performed his official acts. Under the other, constables could be removed only by the same elaborate proceeding as were provided for removal of clerks of superior courts. The law did not provide for suspending a constable between the beginning of proceedings to oust him and final judgment on those proceedings. He might stay in office and commit new offenses after being charged with flagrant misconduct. Nor did the old law provide even for suspension of a constable after he was indicted, until trial. Any number of indictments might be pending against him; and as long as they remained untried, he could remain in office.

The new law provides that all actions shall be commenced by summons; that there shall be two terms a month, convening on the first and third Mondays; that plaintiff or defendant can secure a trial by a jury of five upon demand.

Further provision is made for an appellate division. This is another unique feature of the Atlanta law. The appellate division consists of the chief judge (if he is not disqualified) and two other judges of the court. Appeal on questions of law from the decision of that division is allowed to the Georgia State Court of Appeals.

The Atlanta law stipulates that the required deposit of $2 with each suit filed, shall be returned to the party making it if he wins his case, and shall be collected by the court officers with the costs of the proceedings. These deposits are designed to form the basis of a fund for the maintenance of the court, the expectation being that the court will be self-sustaining. It is anticipated that the requirement of a deposit in advance will discourage the filing of frivolous suits.

Another requirement in the Atlanta law is that all sales ordered by the court shall

be made before the county courthouse door and that proper record of them shall be kept. Under old conditions, no lawyer could tell by what justice court his client's property had been seized. Investigation to determine that often was a matter of much telephoning or personal inquiry. Constables connived with justices to conceal from the citizens upon whom they made their forays, the identity of the court which they represented. It happened frequently that the owner of property levied upon did not succeed in locating it before it had been sold under the bailiff's hammer, nor in some cases even afterward. Sales were made almost anywhere.

A requirement that there shall be one set of court records, and that they shall be kept accurately, is aimed to cure another defect in the old system. References as to the existence, character or status of cases will be concentrated in one court.

A bill based upon the measure outlined in the foregoing was introduced by the representatives from Bibb county, and was passed, giving to the city of Macon on January 1, 1914, practically the same system of municipal courts as Atlanta will inaugurate.

The movement which has had this final result, originated vaguely in the minds of many men and definitely in the minds of two. Those two were Walter McElreath, at the time one of the representatives from Fulton county in the state legislature; and W. A. Fuller, one of the younger lawyers of the Atlanta bar. Those two men put the movement into concrete form. They interested others, and the Atlanta Bar Association was marshaled behind the movement.

Numerous outrages were charged repeatedly against the Atlanta justices or their officers during several years before public dissatisfaction reached the stage where it would support this final issue. Individual protests, grand jury recommendations, resolutions by the Georgia Federation of Labor, by the Atlanta Chamber of Commerce, and by other bodies—these stored up a public sentiment which was ready to accelerate the movement when once it was started.

Extortion was one of the least of the irregularities charged against the attaches of the justice courts. Generally its victims were among the poorer classes, where it hit hardest. Prosecutions to correct it were nothing better than farces. One notorious constable was convicted of extortion in the city criminal court of Atlanta, and carried his case by certiorari to the superior court. It got no further. The certiorari never was heard. The papers had been "lost." When they were seen last, that constable had them. The mistreatment of unprotected women was a matter of frequent occurrence. In one case, two constables who went to a defendant's home to levy upon his household goods found his wife alone there. She was in advanced pregnancy. Intolerant of the purposes of the raiders, she attempted to telephone to the police for aid, whereupon one of the constables jerked the receiver from her ear and thrust her against the wall, holding her there while the other constable, with negro laborers, ransacked the house. Instances like this were so frequent, and reprisals upon them were so futile, that even the newspapers grew to pay scant heed to them. They were matters of course. They belonged with the system.

The justice courts were charged monotonously and wearisomely with numerous other shortcomings—with accepting straw bonds, with connivance between court officials and litigants, with using criminal machinery for the collection of debts, with having people jailed at night without bond who might easily have been arrested in daylight hours; with rough handling of prisoners; and with the issuance of garnishments against persons whose wages were known to be exempt. In short, as the Fulton grand jury of the 1911 March term summarized it, they were charged with conduct which "tends toward anarchy and brings into disrespect and disrepute the laws of the land."

W. T. WATERS.

Atlanta, Ga.

WRECKING THE "ETERNAL" PRINCIPLES OF JUSTICE.

The well known jurist, former U. S. District Judge John F. Philips, of Kansas City, has appeared to raise his voice against the "feverish frenzy of the day."

In one of a series of addresses on Federal Procedure before the Kansas City School of Law, the learned judge, says:

"The fathers of the Republic taught, and the statesmen of the grand old Commonwealth of Massachusetts, where the first rich blood of the American Revolution watered the virgin continent, wrote in letters of imperishable gold into their constitution, that it was ordained in order; 'That this may be a government of law and not of men.' Every student of law should lay this sentiment to his heart, lest the feverish frenzy of the day, clamoring for change, innovation and miscalled reform, shall wreck the eternal principles of justice, bringing incalculable woes upon all the people, who are being invited to cast away their great inheritance of liberty regulated by law, and like

'The base Indian, throw a pearl away,
Richer than all his tribe.'"

Much that the learned judge has to say in his address is admirable. His high respect for our nation's past achievements and veneration of the institutions established in the past and of the great fundamental principles of justice enunciated in the great charters of state and national governments, is worthy of the highest commendation.

But why is it necessary for us to "view with alarm" the so-called "feverish frenzy of the day." In fact, is not this intense mental activity of the people a hopeful and encouraging sign of the times?

The fact that many of the suggestions which are born out of this new renaissance of the intellectual freedom of the masses, are crude or possibly fantastic, should not be sufficient to cause anxiety or criticism so long as the people themselves are slow to adopt even their own suggestions and are always open to the counsels of those of whose sincerity and disinterestedness they are convinced.

Moreover, when the learned judge foretells of the possible wrecking of "eternal principles" as the outcome of the current movements of reform he may well be required to furnish a "bill of particulars." The writer confesses to a complete failure to comprehend in just what way an "eternal" principle can be wrecked.

The phrase "eternal principles of justice" is one on which we can all agree and yet disagree. We all use the phrase in a very vague way and agree, also in a very vague way, that there are such principles, but no two of us will unite in writing a catalog of them and risk our reputations on the result.

Several years ago a very able lawyer in a meeting of lawyers proceeded to denounce both the pure food laws and the Workmen's Compensation laws, then just coming into vogue, as being contrary to two recognized fundamental principles of justice that were, as he contended, as immutable as the laws of the Medes and Persians, to-wit, the principles of caveat emptor and assumption of risk. And yet, since that gentleman's visit, the legislatures, the courts and the people of many states have made such effective attacks upon these two strongholds of the "immutable" principles of the law that they are to-day in danger of being completely evacuated and abandoned.

In fact, deep students of jurisprudence have always taken the position that justice, no more than any other branch of learning can be hitched hard and fast to any so-called "eternal" principles. Civilization advances and science in all its branches is forever rejecting old principles for new ones. Shall therefore the disciples of the law contend that its principles are immutable?

For instance, there was a time when it was possible to say that one man dealt at arm's length with another in selling his labor or buying his food. Under such conditions it was in harmony with sound reason and justice to require that the buyer examine before he buys and that the seller

of his labor should be bound by those risks of his employment that were known to him when he sold his labor. But when conditions change, when bread, sausage, pickles, beef and other food products, instead of being the product of the local community, were manufactured by great corporations in great quantities in distant cities controlling the entire source of supply, under such conditions, shall we continue to say to the buyer "Beware?" Or shall we now change the rule to meet the changed conditions and say to seller "Beware?"

So with the workman selling his labor to a village blacksmith. Here both are dealing at arm's length, man to man, neither at a disadvantage, with respect to the other. The blacksmith explains the dangers of the employment and the laborer accepts the job with such knowledge. Here the doctrine of assumption of risk is of necessity a principle of justice. But such doctrine cannot be said to be an "eternal principle" of justice unless the simple conditions of employment out of which it arose are also to be eternal. If, however, such conditions give place later to those where the work of a thousand village blacksmiths in a thousand different villages is combined into the colossal mills of a United States Steel Corporation, can it then be said that the worker in iron is dealing at arm's length in accepting employment? The absolute necessity for employment still is present, but a thousand opportunities to choose his place of employment, which he had before, are now swallowed up in one. And even the opportunity of changing his employment becomes more remote as centralization continues to increase, until to-day it is practically true that the worker is chained to his employment. Conditions having therefore changed, the law, in order to work justice, must change the principle that operates upon such conditions and instead of requiring the toiler to assume all the risks of his employment it now is beginning to demand of the employer that he assume all the risks of his own business. Hence the Workmen's Compensation Laws.

Thus the law grows like any other living organism should grow and thus it magnificently and imperiously casts aside the useless equipment of the past for the more efficient equipment of the future, in order that it may defeat injustice and promote the general welfare.

Of course, in making changes in its fundamental principles the law should never be in advance of the people. Nor, on the other hand, should it lag too far behind. It should take note of the changes in the people's conceptions of justice or, as Prof. Roscoe Pound, of Harvard University, says, the courts should be just as willing to consider a citation to a work on sociological jurisprudence recording the permanent advances in popular conceptions of justice as they would "a leading case" of Lord Mansfield's time or a statute of King Edward I, as forming a part of the common law.

And, after all, it is the people, not the courts, who make the law. Those conceptions of justice, which are based on the sound judgment and ripe experience of all the people, make the law which the courts must finally declare. And a citizenship like that in the United States to-day, so much more widely informed and educated than the generation of 1783 which adopted the Constitution and has been so generally extolled, surely cannot be expected to act less intelligently in dealing with the problems of the present age than their forefathers did with the problems of their own time.

A. H. ROBBINS.

St. Louis, Mo.

CORPORATION—LIABILITY FOR SLANDER.

NUNNAMAKER v. SMITH'S, et al.

Supreme Court of South Carolina. Dec. 29, 1913. Rehearing Denied Jan. 7, 1914.

80 S. E. 465.

A corporation may be liable for slander.

FRASER, J. This is an action for slander. The important allegations in the complaint are: That the defendant Smith's is a cor-

poration, and the defendant H. K. Smith is the president and treasurer of the corporation. That on or about the 7th day of September, 1912, the plaintiff, Mary Nunnamaker, was, and had been for some time previous thereto, employed by the defendant Smith's in the capacity of cashier in one of the places of business of said corporation, in the city of Columbia, "and in the evening of said date the defendants, through the defendant H. K. Smith, said to and of the plaintiff, Mary Nunnamaker, in the office and place of business of said corporation, a public place, in the presence and hearing of divers persons who were in there, that the plaintiff, Mary Nunnamaker, was $9.85 short in her sales—receipts cash—and asked her what she had done with this money, and told her she would have to make the money good. He asked her how much money she had on her person, and she told him and showed him, and he took the money, which she had, to-wit, $4.75, and told her she must bring the rest of the shortage on Monday, told her she would have to make the money (shortage) good, placing another employé to watch her. Said he could not put up with that shortage, and detained said plaintiff, Mary Nunnamaker, for a considerable length of time, endeavoring to make her produce the money." "(5) That the said defendant, by said language and conduct, meant to charge and did charge the plaintiff, Mary Nunnamaker, with the crime of stealing the money of Smith's, the said corporation, and the said language and conduct was so understood by those who were present and heard it, and the said charge was false, malicious, and slanderous. (6) That the defendants, then and there, by means of said language and conduct, intimidated plaintiff and restrained and prevented the plaintiff from going to her home until after midnight of Saturday night, and then turned her out of said store without money, and a long distance from her home and without any protection. (7) That the said defendants, then and there, by means of said false charge and the conduct of said defendants, and the said intimidation, unlawfully, willfully, and with a high hand, took from the plaintiff, Mary Nunnamaker $4.75 of her own money and property. (8) That the said defendant, H. K. Smith, committed the aforesaid willful, wanton, and wrongful acts in his own wrong and for the use and benefit of the defendant Smith's, a corporation of which he was president and treasurer and active manager, and the said wrong was committed in the presence of H. C. Smith, another officer of said corporation. And as plaintiff is informed and believes, the said corporation approved and took the benefits of said tortious and wrongful acts so committed by its codefendant."

The defendant demurred on four grounds: (1) That the complaint alleged a joint liability against two persons. (2) That the language is not actionable per se and there is no allegation of special damage. (3) That there is no allegation that the charge is false. (4) That there is no allegation of any fact that the defendant, by the words alleged to have been used by them, meant to impute to the plaintiff the commission of some criminal offense involving moral turpitude for which the plaintiff, if charged, if the charge were true, might have been indicted." The demurrer was heard by Honorable Frank B. Gary, and overruled.

The defendant appealed upon four exceptions:

"The defendant excepts to the rulings of the circuit judge in overruling the demurrer to the complaint herein, upon the following grounds, to-wit: (1) Because his honor should have held that the complaint alleges a joint liability against two persons in an action for slander, and that an action for slander cannot be maintained against two persons and should have dismissed the complaint."

(1-3) This exception is overruled. There is no question here of the liability of a corporation for slander. The general rule is that two are not liable jointly for slander even though they speak the same words. The reason for the rule is that, when two speak the same words, there are two slanders and each is liable for his own slander. Where a wrong complained of is done by a corporation which can act only through an agent, then the wrongful act is the joint act of the corporation and the agent, and both may be sued in one action. See Schumpert v. Southern Railway, 65 S. C. 338, 43 S. E. 815, 95 Am. St. Rep. 802. "'When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance or within the scope of his agency are and should be regarded as really the acts of the principal. If therefore the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him.' By legal intendment and effect the act of a servant within the scope of his agency is the act of the master. In such case there is a legal identification of master and servant." Here the words and acts complained of were one and the action is one.

Exception 2: "2. Because his honor should have held that the language alleged to have been used by the defendant is not actionable per se and that the complaint contained no allegation of any special damages suffered by plaintiff on account of said language and should have held that the complaint did not state a cause of action and should have sustained defendant's demurrer."

Exception 4: "4. Because his honor should have held that the complaint contained no allegation of any fact that the defendants, by the words alleged to have been used by them, meant to impute to the plaintiff the commission of some criminal offense involving moral turpitude for which Mary Nunnamaker if charged, if the charge were true, might be indicted, and should have held that the complaint did not state facts sufficient to constitute a cause of action and should have sustained the demurrer."

(4) These exceptions will be considered together. Neither can be sustained. The allegation is that the words and acts taken together charged a crime. In the case of Black v. State Co., 93 S. C. 467, 77 S. E. 51, this court said these questions can rarely be determined on demurrer; that, where the meaning is doubtful, it is a question for the jury. A person may be "short" as the result of incompetence or crime. The complaint alleges that the acts of the defendants showed that they charged a crime. That made a question for the jury, and the complaint was not demurrable on this ground.

(5) Exception 3: "3. Because his honor should have held that the complaint contained no allegation that the alleged statement by defendant to said Mary Nunnamaker that her cash receipts were short was false and untrue, and should have held that the complaint did not state a cause of action on that account and should have sustained the defendant's demurrer."

The complaint alleges "that said charge was false, malicious, and slanderous." This exception is overruled.

The appeal is dismissed.

GARY, C. J., and HYDRICK and WATTS, J. J., concur.

NOTE.—*Slanderous Statements by an Agent.*—It seems to us not to state the question with strict accuracy to ask whether or not a corporation or even a partnership may be liable for slander, but rather whether or not a verbal act by an agent injurious in its nature may make his principal liable therefor. By so considering the matter we pass out of the range of inquiry as to words constituting or not slander per se and away from all questions about *innuendo* and *colloquium*, all of which are connected with precedents and pleadings. Thus the instant case, while recognizing the rule that two persons may not be jointly held in slander, yet holds that the making of a slanderous statement by an agent may be the joint act of him and his principal, in this case a corporation. Here also it may be suggested that, while two agents might not be joined as to one slander, yet, if both uttered the same slanderous statements about another, both approved in advance or ratified afterwards, those statements connected by authority and amounting to an approved course of conduct, the corporation principal could be sued as to all of them in one action.

Further it is suggested that all nicety about such verbal statements being substantially alike would be dispensed with, but the inquiry would be whether there was injurious effect authorized to be brought about.

In Duquesne Distributing Co. v.. Greenbaum et al., 135 Ky. 182, 121 S. W. 1026, 21 Am. & Eng. Ann. Cas. 481, the action was against a partnership but the slanders complained of were of salesmen and agents alleged to be acting in the scope of their authority, with intent to injure plaintiff in its trade and two alleged statements are pleaded, which consist of different words but in meaning approximately the same. But they are not identically the same, and from repeated utterance there is averment of loss of trade. The court viewing the matter like a technical action for slander held that slander is to be differentiated from libel saying: "Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement and more frequently than otherwise are the voluntary thought and act of the speaker." There was a judgment for defendants and it seems there was a mere failure of proof to show authority or ratification and it is noticeable that nothing is said about the joinder of defendants, unless the statement that a partnership was an entity like a corporation may be deemed to have made it unnecessary to take up this question. The frame, however, of the petition seems to regard the statements as verbal acts more than technical slanders.

In Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073, there was a partnership case and it was ruled that statements injurious to the business of another made by one partner and so intended may make the partnership liable. Here the broad characterization is "false representations" to accomplish their end, a better description of means to an end than the word slander, which has a narrower meaning. See also Wheless v. Davis (Tex.), 122 S. W. 929.

In Payton v. People's Credit Clothing Co., 136 Mo. App. 577, 118 S. W. 531, it does not appear whether the action was viewed in a technical way. There was verbal abuse by a general manager, which would have been considered slanderous *per se*, but it was viewed as an act, as to which there was evidence for the jury to consider it within the scope of a general manager's authority, i. e. that he was the *alter ego* of the corporation. It is not a very satisfactory opinion.

In Singer Mfg. Co. v. Taylor, 150 Ala. 574, 43 So. 210, 9 L. R. A. N. S. 929, 124 Am. St. Rep. 90, the view is that a slanderous statement is presumptively not within the course of duty because it is more likely to be the expression of

momentary passion or excitement of the agent, but if expressly ordered it is a tortious act of the principal. This implies it is looked on as an act where it is ordered or directed—a means towards an end. If injurious in effect or puts another under duress or coerces him in any way, it would seem to be an act more than a technical slander, just because a corporation can of itself have no malice, but is responsible for the contemplated consequences of an act.

A case much in point of an injurious statement, in slanderous terms, being a mere tort in general aspect is Buffalo Lubricating Oil Co. v. Standard Oil Co., 42 Hun. 153, where a corporation was found to have entered a combination to slander the business of another concern, and held liable for the means used.

Generally decision is on the theory of the Taylor case, *supra*, e. g. Sawyer v. Norfolk & S. R. Co., 142 N. C. 1, 154 S. E. 793; Behre v. National C. R. Co., 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986; International Text Book Co. v. Heartt, 136 Fed. 132, 69 C. C. A. 127.

In Kane v. Mut. L. Ins. Co., 200 Mass. 265, 86 N. E. 302, the petition or declaration seems to have alleged that three employees on various days uttered various oral statements in regard to plaintiff, but no recovery was allowed because there was no ratification nor any proof the defendant corporation having knowingly received any benefit from the misconduct of its agents. The court questions decision that mere utterance of defamatory words by agents in the course of their employment creates any liability, for which it refers to Philadelphia W. & B. R. v. Quigley, 21 How. 202, 210. In this case there was a libel, but the court dwelt upon evidence to show the corporation by its directors published it.

Where there was a statute giving a right of action for insulting words and suit was for that and not for common law defamation, it was thought that utterance in the course of the business of the corporation made it liable. See Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

We do not see where it has been expressly ruled, that slanderous statements, when a corporation is sued for their utterance by an agent, are spoken of as merely injurious acts, but the trend of opinion is that they must be authorized or ratified, and this regards them as merely torts and not technically as slanders. The fact that such an act is a joint act is opposed to verbal defamation by an agent being slander in a technical sense. Then, too, decisions basing liability in defamation on its being in the course of employment, whether authorized or not, considers it merely as a tortious act and not in a technical way. A principal is responsible or not for acts as acts and not otherwise. Agencies, animate or inanimate, are mere agencies. C.

EXCLUSIVE SCOPE OF FEDERAL EMPLOYERS' LIABILITY ACT.

Where actions under the Federal Employers' Liability Act are brought in State courts matters of local practice and procedure must, of course, be followed as far as they can be, and questions will probably arise from time to time whether a State court regulation necessarily involves substantive rights so as to be superseded by the Federal statute. In Atlantic Coast Line Co. v. Jones, in the Supreme Court of Alabama (December, 1913, 63 So. 693), the opinion was expressed that as the jurisprudence of the State and of the Federal government form together one system constituting the law of the land for the State, and the State courts have concurrent jurisdiction with the Federal courts in actions under the Federal Employers' Liability. Act, it is permissible to join in one action causes based on a violation of the Federal Employers' Liability Act with those based on the State Liability act. If this statement concerned merely a matter of pleadings—which are subject to future amendment—it might be unobjectionable. But a dictum which apparently means that a plaintiff may actually recover damages on separate causes of action under the Federal and a State statute resepectively, arising out of the same transaction, in the same action, would seem unsound.

In Fernette v. Pere Marquette R. Co., in the Supreme Court of Michigan (January, 1914, 144 N. W. 834), it was laid down that if the Federal statute is applicable a State statute is excluded by reason of the supremacy of the former under the national constitution, but that where a declaration counted upon neither act specifically, the trial judge had properly held that the liability was fixed by the State act. "This follows because of the fact that there is no averment in the declaration that at the time of the accident defendant was engaged in interstate commerce. At the time plaintiff commenced his action that fact could not have been known by him, and could have been ascertained only with great difficulty and trouble, if at all." The court, however, then goes on to say that under the liberal power of amendment existing in Michigan the plaintiff might recast his declaration so as to permit recovery under the Federal act when defendant disclosed the requisite condition upon the trial. The fact that made the Federal act applicable was that the train causing the accident, although running between two intrastate points, carried one or more cars billed to a point outside the State. The court said:

"Defendant was in possession of all the facts touching upon the matter, and upon the trial promptly put them in evidence as a matter of defense. Should plaintiff be held to be debarred from recovery because of his failure to aver in his declaration a fact of which he was in ignorance, and which in the nature of things he could not ascertain, we

think it would be a reproach to the administration of justice to so hold. It should ge borne in mind that the declaration sets out facts which would impose a liability upon defendant under the Federal Act if it had charged that, at the time of the collision, defendant was engaged in interstate commerce. We are of opinion that it was not necessary for plaintiff to plead either statute, but that upon the coming in of the proofs it was the duty of the trial court to permit an amendment of the pleadings to conform thereto."

The exclusive application of the Federal Act, when it applies at all, was recently recognized by the First Appellate Division of the New York Supreme Court in Burtnett v. Erie R. R. (December, 1913, 144 N. Y. Supp. 969). On this point the court, by Mr. Justice Scott, said:

"At the commencement of the trial and again at the close of the plaintiff's case the defendant moved that all of the causes of action, except that under the Federal Employers' Liability Act, be dismissed. The motion was denied, and the case was submitted to the jury under a charge that permitted them to find a verdict under either of the State statutes or under the Federal act. This was clearly erroneous. It is alleged in the complaint and is conceded on all hands that at the time he was injured plaintiff was engaged in interstate commerce, and consequently the liability of the defendant is to be determined by the Federal act, which is paramount and exclusive (Michigan Central R. R. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417). The rules of liability under the Federal act differ in important particulars from the rules under the State act. In some respects they are more favorable to injured employees and in some respects less so. In any case the defendant was entitled to have the trial conducted and its liability determined by the only statute which was applicable."

In Louisville & N. R. Co. v. Moore, in the Court of Appeals of Kentucky (January, 1914, 161 S. W. 1129), it was held that in an action by an injured servant, where he attempted to rely both on the common law and the Federal Employers' Liability Act, the defendant's motion to require an election must be sustained.

The exclusive scope of the act was recognized from another point of view in Ullrich v. New York, N. H. & H. R. R. in the U. S. District Court for the Southern District of New York (February, 1912, 193 Fed. 768). It was held that where the facts pleaded in the complaint in an action for death of a servant showed a cause of action under the Federal Employers' Liability Act, a cause of action under the New York Labor Law, and also a cause of action at common law, it was nevertheless a "cause arising" under the Federal Act, and, having been brought in the State court, was, under the Federal Act, not removable to a Federal court, notwithstanding diversity of citizenship. Judge Hand, who rendered the decision, stated that District Judges Holt and Hough, having read his opinion, agreed with the conclusion reached. The following language from the opinion is of considerable interest:

"There remains a theoretical point which the case sharply raises. The complaint alleges not only those facts upon which depends the 'right' created by the United States Employers' Liability Act, but also those upon which depend another 'right' created by Labor Law, N. Y., section 200 et seq., and, moreover, those upon which the common-law 'right' depends. Now, were it not for the fact that the Federal 'right' was alleged, the defendant could come into the Federal court, paradoxical though that result may seem. How, then, can the defendant obtain its right to a trial in a Federal court upon the common-law and New York statutory 'rights'? An obvious way would be to compel the plaintiff either to disclaim any 'right' in this action, except the Federal, or in the alternative to separate his action into two parts, and remand one, while I kept the other. The result of the latter alternative would be to have two actions brougnt by the same plaintiff, pending at the same time, to recover for the same injuries caused by the same accident. I purposely leave the word 'accident' vague, because in one case the cause of the injury might be a fellow servant, in the other a defective track, and therefore the causes are not necessarily the same. However, it is a question whether the meaning of Congress should include the subdivision of a 'case' into such 'causes of action.' I think not. I believe that the 'case' for all purposes arises under the Federal Employers' Liability Act, when the plaintiff alleges that he was himself engaged in interstate commerce and is injured by an interstate railroad. It is immaterial, as I regard it, to consider nicely whether the Employers' Liability Act creates a new 'right' or whether it changes the incidents of the 'right' at common law or under the New York Labor Law, nor do I mean to suggest that the plaintiff might not succeed upon those latter 'rights'

though he failed to show that he was engaged in interstate commerce. It is enough to avoid the jurisdiction of this court for all purposes that he has alleged that he was engaged in interstate commerce. An analogy exists for this interpretation in those cases in which a federal court, having one ground of jurisdiction, can dispose of the whole case, though it involves other matters (Railroad Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96), as, indeed, in those in which the jurisdiction remains, though the allegations of jurisdiction prove unsupported (City R'y v. Citizens' Steel R. R., 166 U. S. 557, 17 Supp. Ct. 653, 41 L. Ed. 1114). So here, though the defendant could remove, were it not for the allegations which bring the case within the Employers' Liability Act, I think it could not have been the intention of Congress to sever three such knitted causes of action and bring two into this court, while the other stayed where it was. The 'case' arose, I think, for all purposes under the act."—*New York Law Journal.*

Note.—Under title "Joinder of Causes of Action Arising Under Federal and State Law, 78 Cent. L. J. 91," we discussed the expression in the Alabama case first alluded to by our contemporary, and reproduce the above appearing in its columns on February 9, 1914, an article of value, as indicated by the fact of so many cases so near together in dates touching the question involved. In 78 Cent. L. J. 109, an editorial under the title "The Meaning of 'Negligence' in the Federal Employers' Liability Act" is referred to in this connection—Editor Cent. L. J.

ITEMS OF PROFESSIONAL INTEREST.

WHAT TO DO WITH THE CRIMINALLY INSANE.

The New York Bar is all wrought up over the failure of the authorities to bring back their ward, the notorious Harry K. Thaw.

A meeting of the Committee on the Commitment and Discharge of the Criminal Insane of the New York Bar Association was held January 31, 1914, and suggestions made for two amendments to the criminal laws of that state.

The changes proposed may be stated in the words of our esteemed contemporary, the New York Law Journal, as follows:

"(1) The abrogation of the antiquated, unscientific 'knowledge of right and wrong' test of insanity and its absurd concomitant, the distinction between 'legal insanity' and 'medical insanity,' and (2) a change in the law so that where the defense of insanity is interposed, a person may be found guilty but insane, instead of being acquitted on the ground of insanity. The rule stated in the second suggestion has prevailed in England for many years and has given satisfaction in practice. Besides intrastate advantages in removing embarrassments as to the treatment of "insane criminals,' if the law of New York had permitted a verdict that Harry K. Thaw was guilty but insane, there is little doubt that such a verdict would have been rendered, and if he had subsequently escaped from an asylum and gone into another state he would have been a 'fugitive from justice' and amenable to extradition under the Federal law."

The report of the committee above referred to closes with the following argument:

"No injustice would be done to a sane man who after committing murder has by the aid of deceived or purchased experts and dishonest counsel persuaded a jury that he was insane. He deserves but escapes the full punishment demanded by the law. He cannot complain if the law takes him at his word and sends him to keep company with those who are really insane. He is given the choice at the time of his arraignment whether he will rely on an allegation of insanity in order to save his life. He is not obliged to plead insanity. If he prefers life in an insane asylum, with a chance of pardon, to death, that is his affair, not the State's. He makes his own bed. Let him lie on it. No more deterrent act in respect of the wayward, badly brought up, self-willed fast young man, whose wealth is a curse to himself as well as the community, could be devised. * * *

"Lastly, the power of the jury to render a verdict of guilty but insane would, in connection with its power, which is to remain unaffected, to render a verdict of not guilty or guilty as the case may require, will enable a jury to do exact and equal justice between the community on the one hand and the accused on the other. To sum up: Formerly the jury was shut up to the alternative of conviction or acquittal. The state of mind of the accused might well be such as to prevent, and properly prevent, a jury from rendering a verdict which in a case of murder in the first degree would require the taking of his life. Thus it resulted that where the jury was in doubt as to how far the heredity of the accused and his former actions evidenced a state of mind which made it dubious as to the justice of a verdict which would result in taking his life, they were compelled to render a verdict of acquittal. The scandals arising from such verdicts—which, by the way, every

one of us who criticise jury trials would probably have rendered if we had been in the jury box—grew to such an extent that they had to be recognized by the law. Then came the middle course of allowing a jury to render a verdict of not guilty by reason of insanity. This may have been well enough for that stage of our evolution and in that stage of our ignorance as to true psychology. That statute, however, while it provided a way of escape for a jury from a most distressing dilemma, in turn brought about other evils. In the meanwhile we have progressed in knowledge of psychology. In the judgment of the committee the time has come to take a further step in the evolution of our criminal law."

The question of regulating the defense of insanity is a difficult one but we are not certain that the suggestion of the New York Bar Association Committee properly solves it.

It is axiomatic that there can be no crime where the intent is wholly lacking. How, therefore, a hopeless idiot could be adjudged "guilty" of the commission of a crime is difficult even to imagine. It would be equally proper to hold a man guilty of murder for accidentally killing a friend while cleaning his gun. A verdict of "guilty but insane" would be in the same category as a verdict of "guilty but couldn't help it." Both are contradictions. But worse than that, conviction for crime frequently carries with it civil penalties and forfeitures which fall as heavily upon the accused and his family as the execution of the sentence would do. Thus a patient in one of our hospitals while in a delirium kills his wife. On his recovery a judgment of "guilty but insane" would deprive him of all the rights of citizenship, of his right of inheritance from his wife, and cast a shadow over his whole life—all of which is unnecessary, unjust and unthinkable.

Would it not be more in keeping with truth and justice to provide for a verdict of "not guilty, but insane," and even to permit the jury to find that the defendant is at the time of the trial dangerous to himself and the public and to recommend that he be confined as an insane person for a definite or indefinite period. This casts no stigma of guilt on the defendant whose plea of mental derangement is sincere and yet permits the jury in cases of doubt to say to the defendant "You are either guilty of the crime, or if insane you are too dangerous to the community and to yourself to be at liberty." This to our mind is all that is required under the circumstances to defeat the false and insincere plea of not guilty.

BOOK REVIEWS.

DANIEL ON NEGOTIABLE INSTRUMENTS, SIXTH EDITION.

This standard book by the late Senator John W. Daniel, appears since his decease in its sixth edition, as re-edited and enlarged by Mr. Thomas H. Calvert of the Raleigh, N. C., bar. Mr. Calvert formerly was of the editorial staff of Edward Thompson Company, is author of "Regulation of Commerce Under the Federal Constitution and Annotator of the Constitution in Federal Statutes Annotated." He thus comes to this labor, not as a novice, but feels that the text in his work should be allowed to stand as it came from the hand of Senator Daniel, additions, however, have been as decision and statute have made necessary.

It is pointed out in the preface to this edition that since its predecessor appeared the uniform negotiable instruments statute has been adopted in nearly all of the states and effort has been made to obtain an exhaustive collection of the cases in which it has been construed. Consideration of these cases has been woven into the treatment followed by Senator Daniel, and they are identified by a catchline in each instance as this: "Under the Negotiable Instruments Statute."

This comparative study of the general law and effect thereon by this statute are brought in near relation, very much to the advantage of students and practitioners.

It would seem not only wholly unnecessary to speak of the merits of this work, but also it would argue that the readers of this notice of the appearance of this edition might lack some acquaintance with its reputation.

The edition is in two volumes covering over 2200 pages, is handsomely bound in law buckram and issues from the house that has published its first and all the intervening editions, Baker, Voorhis & Co., New York, 1913.

HUMOR OF THE LAW.

An interpreter in a New Mexico court in a suit by a negro against a white man, translated the charge of defendant's attorney that plaintiff was a "blackmailer" into meaning that he was a negro mail carrier.

A newly appointed crier in a county court in Australia, where there are many Chinese, was ordered by the judge to summon a witness to the stand. "Call for Ah Song!" was the command. The crier was puzzled for a moment. He glanced shyly at the judge, but, seeing that he was perfectly grave, he turned to the court and said, "Gentlemen, would any of you favor his lordship with a song?"

The following colloquy took place between an attorney and a prospective juror, who was being examined relative to his qualifications. The juror came from a small inland city noted for its large flour mills.

Attorney—"What is your occupation?"

Juror—"I work in the mill."

Attorney—"What capacity?"

Juror (proudly)—"Five thousand barrels."—A. G. E.

WEEKLY DIGEST.

Weekly Digest of All the Current Opinions of All the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Attachment**—Sheriff's Return.—A sheriff's return of an attachment is conclusive as against him; it being presumed that he has taken such possession or control of the property as is necessary to render the attachment valid.—Cary Brick Co. v. Tilton, C. C. A., 208 Fed. 497.

2. **Bankruptcy**—Fixed Liability.—Where by the terms of a lease of a cash carrier system the whole amount of the rent specified was to mature on the lessee's default for 60 days in the payment of an installment of rent and an installment had been due and unpaid for more than 60 days at the time bankruptcy intervened, the whole amount of the rent was a "fixed liability" absolutely owing, for which the claimant was entitled to prove.—In re Miller Bros. Grocery Co., U. S. D. C., 208 Fed. 573.

3.——Practice.—Where H. acquired property 10 days before his death, and turned it over to his sons to be handled by them under the firm name of H. & Sons, and his heirs made no claim thereto until the bankruptcy of the firm, the administrator cannot, after the bankruptcy, claim the property as individual property.—In re F. W. Wall & Sons, U. S. D. C., 208 Fed. 578.

4.——Selection of Trustee.—Where the referee and judge concur in disapproving the selection of a trustee, made by the creditors as authorized by general orders in bankruptcy, their action will be sustained, unless an abuse of discretion is shown.—M. C. Kiser Co. v. Georgia Cotton Oil Co., C. C. A., 208 Fed. 548.

5.——Unaccrued Rent.—Unaccrued rent under a lease of a store service apparatus may be provable in bankruptcy, where the apparatus was required to be specially adapted to the premises and could not be used again to advantage, and the parties have so provided by their contract.—In re Caswell Massey Co., U. S. D. C., 208 Fed. 51.

6. **Bills and Notes**—Waiver of Protest.—A provision of a note that each surety and indorser waived notice, protest, and presentation for payment fixed the liability of an indorser upon nonpayment, without protest, as effectually as a protest would have done.—Central Bank & Trust Co. of Houston v. Hill, Tex., 160 S. W. 1099.

7. **Boundaries**—Watercourse.—Where a grant of land described the same as bounded by a nonnavigable stream, the grant extended to the thread of the stream unless a contrary intention was manifested from the grant itself.—Ford v. Commonwealth, Ky., 160 S. W. 1080.

8. **Breach of Marriage Promise**—Punitive Damages.—Punitive damages are not recoverable, unless the complaint alleges the purpose with which defendant acted, as that he acted maliciously or wantonly, to oppress or injure plaintiff.—Hiveley v. Gollnick, Minn., 144 N. W. 213.

9. **Brokers**—Middleman.—Where a broker is a mere middleman to bring the owners together, he may receive a commission from both parties for his services, contrary to the general rule.—T. A. Hill & Son v. Patton & Schwartz, Tex., 160 S. W. 1155.

10. **Carriers of Goods**—Illegal Shipment.—Where, though a shipper of eggs included them with live poultry to make a car load, thus obtaining a lower freight rate than he was entitled to, he did so in good faith, with the knowledge of the carriers' agent, the illegality of the shipment did not absolve the carriers of liability for damages to the eggs through its negligence.—Houston & T. C. R. Co. v. Commons, Tex., 160 S. W. 1107.

11.——Limiting Liability.—While a carrier may not contract for immunity from liability for loss or injury from its own or its servant's negligence, it may, in consideration of a reduced freight rate, agree on the value of things shipped as a measure of damages in case of loss, whether resulting from negligence or not, providing the amount is not unreasonable.—Alabama Great Southern R. Co. v. Knox, Ala., 63 So. 538.

12.——Special Damages.—A carrier of freight is not liable for special damages for delay unless notified by the shipper of such probability when the goods are delivered to it.—Yazoo & M. V. R. Co. v. Allen, Miss., 63 So. 572.

13.——Special Damages.—Loss of profits which plaintiff would have realized had the shipment been promptly delivered are special damages which are recoverable only when specially pleaded.—Southern Ry. Co. v. Langley, Ala., 63 So. 545.

14.——Waiver.—Where several letters passed, and the carrier, more than three months after the loss, requested an itemized statement of loss, with which request the shipper complied, held, that the carrier waived a compliance with a requirement of the shipment contract as to time of notice.—Robinson v. Great Northern Ry. Co., Minn., 144 N. W. 220.

15. **Carriers of Passengers**—Baggage.—It is not essential to the relation of carrier and passenger, so as to render the carrier liable for loss of baggage checked, that the passenger should accompany the baggage.—Alabama Great Southern R. Co. v. Knox, Ala., 63 So. 538.

16.——Elevator.—The stopping of an office building elevator at a point where its floor and that of the building are practically on a level, with the door of the elevator shaft open, is an

implied invitation to passengers to enter or leave.—Grant v. Allen, Ga., 80 S. E. 279.

17.——Mental Anguish.—Passenger cannot recover for mental anguish arising solely from the fact that it may have failed to carry him to his destination within the schedule time, whereby he failed to connect with another railroad company.—Central of Georgia Ry. Co. v. Wallace, Ga., 80 S. E. 282.

18. **Commerce**—Being Engaged In.—Attorneys on guaranteed list of foreign corporation furnished to subscribers who were to report on the credit of persons doing business in the state are not engaged in interstate commerce, so as to relieve the corporation from liability for license tax imposed on commercial agencies, though some inquiries may be received from nonresident merchants in anticipation of interstate transactions.—United States Fidelity & Guaranty Co. of Baltimore, Md., v. Commonwealth of Kentucky, 34 Sup. Ct. Rep. 122.

19. **Common Carriers**—Special Favors.—A common carrier engaged in interstate commerce cannot grant special favors to anybody.—Johnson v. New York, N. H. & H. R. R., Me., 88 Atl. 988.

20. **Contracts**—Ambiguities—If parol evidence is necessary to explain any ambiguities in a contract, the question of construction is one of mixed law and fact for the jury under proper instructions.—Arlington Heights Realty Co. v. Citizens' Ry. & Light Co., Tex., 160 S. W. 1109.

21. **Corporations**—Dissolution.—When a private business corporation has failed in its purpose, a single stockholder may maintain a bill for its dissolution and the distribution of its assets, whether the corporation be solvent or insolvent.—Decatur Land Co. v. Robinson, Ala., 63 So. 522.

22.——Personal Debt.—The president was personally liable for goods purchased by him, where he did not disclose that he was purchasing them as agent for the corporation.—Hilliard v. Upper Coos R. R., N. H., 88 Atl. 993.

23. **Criminal Law**—Judicial Notice.—The Court of Criminal Appeals will take judicial notice of the date of the incumbency and resignation of a certain judge, and also of the date on which his successor was appointed and took the oath of office.—Porter v. State, Tex., 160 S. W. 1194.

24.——Offering Instructions.—Accused was not entitled to have prayers for instructions considered, where they were handed to the judge on the second day of the trial, after two arguments had been made on the preceding day, and while the judge was preparing his charge.—State v. Claudius, N. C., 80 S. E. 261.

25.——Reasonable Doubt.—An instruction in effect that the jury may infer guilt if they cannot reconcile the circumstances with honest conduct, but must infer innocence if possible, held not erroneous.—State v. Kuehnle, N. J., 88 Atl. 1085.

26.——Statute of Limitations.—The plea of the statute of limitations is available under the general issue of not guilty, and no special plea is required.—State v. Unsworth, N. J., 88 Atl. 1097.

27. **Damages**—Liquidated.—When damages are uncertain in amount and not readily susceptible of proof, and the parties have agreed upon a sum as the measure of damages for the breach, which is not disproportionate, such sum is recoverable as liquidated damages.—City of Summit v. Morris County Traction Co., N. J., 88 Atl. 1048.

28. **Dedication**—Abandonment.—Occasional and irregular travel across a ranch by land claimants and hunters held not evidence of an abondonment or dedication of the land to the public by the owner for highway purposes.—United States v. Rindge, U. S. D. C., 208 Fed. 611.

29.——Temporary Use.—The temporary use of unoccupied portions of a railroad right of way by the public or adjoining owners for street purposes held not to constitute a common-law dedication of the land as a street by the railroad company.—H. A. & L. D. Holland Co. v. Northern Pac. Ry. Co., U. S. D. C., 208 Fed. 593.

30. **Descent and Distribution**—Covenants.—An heir is liable for the breach of covenants of warranty made by his ancestor only to the extent of his inheritance from that ancestor, and the property claimed to have been inherited from the ancestor must be properly identified before it can be subjected to lien.—Meyer v. McDill, Ark., 160 S. W. 1088.

31. **Disorderly House**—Burden of Proof.—To authorize conviction of keeping a lewd house, it is necessary to prove the general reputation of the house or its inmates, and that the house was kept for the practice of fornication, and that the acts of lewdness were practiced in it.—Ward v. State, Ga., 80 S. E. 295.

32. **Easements**—Permissive.—Where the use of a passageway has been merely permissive, no length of time will deprive the owner of the right to reclaim it, but where the use has been asserted as a matter of right, an easement arises by 15 years' uninterrupted use.—Salmon v. Martin, Ky., 160 S. W. 1058.

33.——Way of Necessity.—A way of necessity ceased when a highway was laid out leading to the premises to which the way was appurtenant.—Haserick v. Boulia-Gorrell Co., N. H., 88 Atl. 998.

34.——Way of Necessity.—A way of necessity cannot rise unless there are no other means of ingress and egress; the right not being sustainable by mere proof that the way claimed is more convenient or desirable than some other way because of the mountainous character of the country.—United States v. Rindge, U. S. D. C., 208 Fed. 611.

35. **Election of Remedies**—Estoppel.—To sustain a defense founded on the doctrine of estoppel by the election of remedies, it must appear that plaintiff actually had two available remedies and undertook to pursue one.—McLane v. Haydon, Tex., 160 S. W. 1146.

36.——Estoppel.—Where a lease of real property for an amusement park was assigned to a corporation, the lessors' pursuit of a remedy against the stockholders of the corporation was not an election barring the pursuit of another remedy against subsequent assignees of the lease or purchasers thereof at a receiver's sale

of the corporation's property.—Zwietusch v. Luehring, Wis., 144 N. W. 257.

37. **Equity**—Pleading.—A prayer for relief, not based upon allegations in the statement of the bill, creates no equity.—Wade v. Moore, Fla., 63 So. 582.

38. **Evidence**—Insanity.—Insanity at any particular time, if shown to be habitual and permanent, is presumed as a matter of law to exist at any future time, and from its existence alone at a later time there is a presumption of fact that it existed at a given prior time.—Melvin v. Murphy, Ala., 63 So. 546.

39.——Nonexperts.—A nonexpert witness must base his opinion as to the sanity of a party inquired of solely upon his own personal knowledge, observation, acquaintance, experience, phy, Ala., 63 So. 546.

40. **Frauds, Statute of**—Guaranty.—Where a defendant stated to a prospective vendor that if shipments were made to a third person he would guarantee payment, the promise was in the nature of a guaranty and not binding when not in writing.—Southern Coal & Coke Co. v. Randall, Ga., 80 S. E. 285.

41.——Memorandum.—Where a memorandum made by the auctioneer on a sale of land referred to the advertisement for a description of the premises, such description must be considered as embraced by the memorandum in determining whether it is sufficiently definite to satisfy the statute of frauds.—Laforme v. Bardley, N. H., 88 Atl. 1000.

42. **Homicide**—Aggressor.—If defendant is the aggressor, and provokes deceased to resent his attack, for an excuse to slay deceased, and under such circumstances killed deceased in the spirit of malice, the killing was murder.—Chancery v. State, Ga., 80 S. E. 287.

43.——Burden of Proof.—Where death resulted from pneumonia, the burden was on the state to prove beyond a reasonable doubt that the pneumonia germ entered decedent's lungs through wounds inflicted by defendont.—State v. James, Minn., 144 N. W. 216.
etc., of and with such person.—Melvin v. Mur-

44.——Evidence.—On trial for procuring a wife to murder her husband, proof if illicit relations between the wife and the accessory is competent on the question of motive.—State v. Fiore, N. J., 88 Atl. 1039.

45. **Husband and Wife**—Equitable Title.—Where the vendee pays part of the price and takes possession, he has an equitable title, to which his wife's marital right attaches, though the contract provides that the vendor shall convey to the vendee's assignees upon surrender of the contract.—Wellington v. St. Paul, M. & M. Ry. Co., Minn., 144 N. W. 222.

46.——Joinder.—Where a husband signs as a witness to a bill of sale executed by his wife and subsequently recognizes the sale, this is a sufficient joinder in the contract by the husband.—Davis v. Leonard, Fla., 63 So. 584.

47. **Injunction**—Criminal Offense.—A court of equity has jurisdiction of a suit to enjoin the enforcement of a statute which affects property rights, although its violation is punishable as a criminal offense.—Little v. Tanner, U. S. D. C., 208 Fed. 605.

48.——Labor Unions.—For the members of a labor union, which was conducting a strike, to parade around and loiter about the premises of the employer using threats and violence, so as to impede those employes who continued to work, is unlawful.—Baltic Mining Co. v. Houghton Circuit Judge, Mich., 144 N. W. 209.

49. **Insurance**—Estoppel.—Defendant held estopped to deny liability on a certificate because of decedent's rejection by other companies, where the medical examiner had knowledge of such rejections and acquiesced in a negative answer to a question calling for such rejections on the theory that the question applied only to rejection by defendant association.—Masonic Life Association v. Robinson, Ky., 160 S. W. 1078.

50.——Subrogation.—Insurer who paid loss held entitled to sue the one causing the fire in the name of insured.—Soffman v. Louisville & N. R. Co., Ala., 63 So. 527.

51.——Subsequently Acquired Property.—An insurance policy upon household and kitchen furniture, which was to run for three years, includes furniture acquired subsequent to the issuance of the policy.—Delaware Ins. Co. v. Wallace, Tex., 160 S. W. 1130.

52. **Intoxicating Liquors**—Burden of Proof.—Where, in a prosecution for selling intoxicating liquor, it was conceded that defendant as secretary of an association had obtained a federal license authorizing it to sell liquors at retail, the burden was on defendant to prove that he did not participate in any of the sales made by the association.—Taylor v. State, Ga., 80 S. E. 292.

53. **Judgment**—Setting Aside.—Where defendant's counsel had arranged to notify defendant when the case was tried, so that defendant could get there, but counsel was prevented from then being at the courthouse by being taken ill en route thereto, held that there was no negligence, so that the judgment for plaintiff should be set aside.—Armstrong v. Elrick, Mo., 160 S. W. 1019.

54. **Licenses**—Revenue.—The power delegated to a municipality to impose a license tax for revenue, when not limited by statute, is in the discretion of the municipal authorities; but, when delegated as a police power, it must be exercised as a means of regulation only, not as a source of revenue, and is subject to review by the Supreme Court—Dunn v. City of Hoboken, N. J., 88 Atl. 1053.

55. **Limitation of Action**—Fraudulent Concealment.—Fraudulent concealment in reply to a defense of limitations must specify the fraud whereby the concealment was affected; mere allegation of frauds or falsehoods by the defendants being insufficient, unless concealment of the cause of action would necessarily follow from them.—Strout v. United Shoe Machinery Co., U. S. D. C., 208 Fed. 646.

56. **Master and Servant**—Fellow Servant.—The fellow-servant doctrine does not apply to an injury sustained by a master's breach of a nondelegable duty.—Big Hill Coal Co. v. Clutts, C. C. A., 208 Fed. 524.

57.——Malicious Conduct.—The maxim respondeat superior applies when the servant acting in the line of his employment about the master's business acts negligently, willfully, or maliciously, even when such acts are contrary to the master's orders.—Whiteaker v. Chicago, R. I. & P. R. Co., Mo., 160 S. W. 1009.

58.——Proximate Cause.—A master who required his servant to labor in a manhole filled with combustible gas is liable for injuries from an explosion from a spark emitted from the concrete walls of the manhole when struck with a metal bucket, though the precise injury could not have been foreseen.—Ebersole v. Sapp, Tex., 160 S. W. 1137.

59.——Safe Place.—While an employer must furnish a safe place for work, he is not responsible for dangers in places needlessly chosen by employes without his knowledge but only for the condition of places which it is his duty to furnish.—Priebe v. Hirsh, Wis., 144 N. W. 287.

60. **Mechanics' Liens**—Public Property.—Public property is not ordinarily subject thereto by statute.—Barrett Mfg. Co. v. Board of Com'rs for Port of New Orleans, La., 63 So. 505.

61. **Monopolies**—Copyright.—Copyright monopoly conferred by federal laws does not protect as against condemnation under Sherman Anti-Trust Act, agreements between 75 per cent of the book publishers and a majority of the booksellers to restrict sale of copyrighted books to those only who will maintain the fixed net retail price.—Straus v. American Publishers' Ass'n, 34 Sup. Ct. Rep. 84.

62. **Mortgages**—Estoppel.—A mortgagor who, under the record, had parted with his title though by a simulated sale, has no standing to challenge foreclosure against the record owner.—Zayas v. Lothrop, Luce & Co., 34 Sup. Ct. Rep. 108.

63. **Municipal Corporations**—Abutting Owner.—An abutting owner cannot recover for any inconvenience or damage to his property from making a fill in the street in changing the grade under the advice and supervision of the city engineer, whose plans were approved in good faith by the city authorities, unless the

work was negligently done.—Hoyle v. City of Hickory, N. C., 80 S. E. 254.

64.——Snow and Ice.—That property was unoccupied held not to relieve owner of duty to comply with city ordinance relative to keeping sidewalks free from snow and ice.—Hartsell v. City of Asheville, N. C., 80 S. E. 226.

65. **Payment**—Remittance by Mail.—Where remittances are made through the mail, the sender runs the risk of loss, and the addressee is not liable, unless the remittance is actually received.—Model Mill Co. v. Webb, N. C., 80 S. E. 232.

66. **Principal and Agent**—Collection Agency.—A collection agency, in the absence of a special contract limiting its liability, is an independent contractor, and as such it is liable to a constable whom it employs in the course of its business to serve writs of attachment.—McCarthy v. Hughes, R. I., 88 Atl. 984.

67.——Course of Conduct.—An agent's authority to draw a draft upon his principal may be established by the conduct and course of business of the principal.—Germain Co. v. Bank of Camden County, Ga., 80 S. E. 302.

68. **Principal and Surety**—Release.—An extension of time granted by the payee to one whose name did not appear on the note, but who was alleged to be a comaker, did not release a surety.—Central Bank & Trust Co. of Houston v. Hill, Tex., 160 S. W. 1099.

69. **Railroads** — Concurrent Negligence.—Where deceased was in fault for not seeing the approach of a train, and the defendant road was equally in fault for not anticpating his presence, so that the injury resulted from their concurrent negligence, there could be no recovery.—Chabott v. Grand Trunk Ry. Co., N. H., 88 Atl. 995.

70.——Malice.—A railroad company is not liable for injuries from frightening horses on the highway by noises which are incident to the movement of the train, as the escape of steam and the rattling of cars, but is liable therefor if the employes wantomly and maliciously use the signal appliances or discharge steam so as to frighten animals.—Boan v. W. T. Smith Lumber Co., Ala., 63 So. 564.

71.——Negligence Per Se.—There being no statutory regulation, trains may run in the country, away from congested populations, at any practicable rate of speed, and the rate of speed of a train by which a person is struck is not negligence per se or at all.—Rollinson v. Wabash R. Co., Mo., 160 S. W. 994.

72. **Reformation of Instruments**—Laches.—Plaintiff was not guilty of laches, barring right to reformation of a building contract for mutual mistake, as to plans referred to by it, where a mere inspection of the contract would not show what plans were referred to, and he did not know of the mistake till defendant put in a claim, 18 months after the making of the contract, for extras, and after that there was no unreasonable delay in seeking reformation. Garage Equipment Mfg. Co. v. Danielson, Wis., 144 N. W. 284.

73. **Removal of Causes**—Jurisdiction.—Where the petition for removal and the bond required by Judicial Code U. S., § 29, are filed, and the provisions of the federal law complied with, the jurisdiction of the state court ceases, and that of the federal court immediately attaches.—Chattanooga Boiler & Tank Co. v. Robinson, Ga., 80 S. E. 299.

74.——Separable Controversy.—Where the corporate employer and an individual servant are sued on a joint liability shown by the petition for misfeasance by the servant, the cause of action is not removable to the federal court, though the master be a nonresident, where the servant is a resident and citizen.—Whiteaker v. Chicago, R. I. & P. R. Co., Mo., 160 S. W. 1009.

75.——Subrogation. — Insurance companies which have paid policies on property destroyed through the negligence of a third person and been subrogated and have joined with the owner in an action to recover therefor are real parties in interest under the laws of Washington, and not merely nominal parties, for the purpose of determining the removability of the cause.—Palmer v. Oregon-Washington R. & Nav. Co., U. S. D. C., 208 Fed. 666.

76. **Sales**—Contract—If one purchasing a suit from plaintiff selected the person who took her measurements, plaintiff would only be required to make a suit according to the measurements, and would not be responsible for any mistake therein, even though the customer erroneously supposed that such person was plaintiff's agent.—Weaver-Dowdy Co. v. Fritz, Ark., 160 S. W. 1085.

77.——Waiver.—Correspondence between seller and buyers of lumber, who had paid part of the price, relative to its return held to show that the seller agreed to accept it and directed its return, thereby waiving his right to contend that the buyers had no right to rescind.—Trexler v. Wilson, S. C., 80 S. E. 271.

78. **Set-Off and Counterclaim**—Recoupment.—In assumpsit a defendant cannot set off a claim due him under a trust agreement to which plaintiff was a party, for trusts are peculiarly the creatures of equity.—Southern Grocery Co. v. Harrison, Ala., 63 So. 535.

79. **Sheriffs and Constables**—Surety on Bond.—A constable's bond should be fairly construed, and not extended by implication, and the obligation contained therein determined from the bond itself; the liability of sureties being strictissimi juris.—State ex rel. Hamilton v. May, Mo., 160 S. W. 1030.

80. **Trade-Marks and Trade-Names.**—Clear Hands.—To restrain defendant from selling goods; falsely representing them to be manufactured by plaintiff, plaintiff must come into court with clean hands.—Horlick's Malted Milk Co. v. A. Spiegel Co., Wis., 144 N. W. 272.

81.——Territorial Boundaries.—A trade-mark has no territorial boundaries of municipalities or states or nations, but extends to all markets where the trader's goods have become known and identified by the use of the mark; but the mark itself cannot travel to markets where there is no article to wear the badge and no trader to offer the article.—Hanover Star Milling Co. v. Allen & Wheeler Co., C. C. A., 208 Fed. 513.

82. **Trusts**—Accord and Satisfaction.—Where the beneficiary of a trust did not know that the trustee's method of computing interest was wrong, a settlement based on such erroneous computation does not constitute an accord and satisfaction.—Weakley v. Meriwether, Ky., 160 S. W. 1054.

83. **Vendor and Purchaser** — Rescission. — Where purchaser repudiated the contract, vendor, who was willing to comply therewith, held not bound to tender a deed before rescinding and suing in trespass to try title.—Pollard v. McCrummen, Tex., 160 S. W. 1148.

84. **Waters and Water Courses**—Municipality.—An exclusive franchise granted by a city to waterworks company to supply water for a definite term does not prevent the city from issuing bonds for and constructing its own waterworks to be operated after the franchise expires.—City of Vicksburg v. Henson, 34 Sup. Ct. Rep. 95.

85.——Riparian Owner.—A manufacturing company owed an adjacent landowner the duty of not changing the contour of its land so as to interfere with the enjoyment of his premises, so that, if it created a pond so as to change the natural flow of the water and impound it, it was liable for injury to plaintiff's land by the breaking of the dam.—Sloss-Sheffield Steel & Iron Co. v. Webb, Ala., 63 So. 518.

86. **Wills**—Classes.—Where the property bequeathed to a class was personal estate, it should be divided in equal shares among the members of the class living and the executors or administrator of those deceased.—Hazard v. Stevens, R. I., 88 Atl. 980.

87.——Construction.—In determining the quality of an estate conveyed by will and codicil, both instruments must be construed as one.—McClelland v. Rose, C. C. A., 208 Fed. 503.

88.——Interlineation.—Where an interlineation was made in a will after it was subscribed, but before it was published or the signature acknowledged, the will with the interlineation, as subsequently published and acknowledged, was "signed" by testator, though he did not again subscribe his name thereto.—In re Bullivant's Will, N. J., 88 Atl. 1093.